85-950

No. ____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1985

Lowell B. Marchant ..... *Petitioner*

v.

United States of America ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Can an indictment for tax evasion that is returned in a district where the taxpayer-defendant had no personal presence, but in which the tax return preparer officed, meet the requirements of jurisdiction and venue set by Article III, Section 2, Clause 3, and the Sixth Amendment to the United States Constitution?

2. Is a taxpayer-defendant who is charged with willfully evading taxes by filing false returns entitled, based upon his theory of defense, to have a jury instruction given that he relied upon a competent CPA to correctly prepare these returns?

3. Was the taxpayer-defendant denied due process of law, when the courts below denied his Motion to Dismiss Count I of the Indictment as being untimely returned, when these courts ruled that his eleven (11) day pleasure and health trip to Switzerland tolled the applicable statute of limitations on prosecution for an equal period of time?

PARTIES

The Petitioner and Respondent are the only parties involved in this criminal action.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Lowell B. Marchant, respectfully prays that a writ of certiorari will be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on October 4, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is published at 774 F.2d 888, and is reproduced as Appendix A of this Petition. The District Court's dispositive rulings are unreported.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on October 4, 1985. Rehearing was not sought. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The applicable provisions of the Constitution, statues and rules involved are lengthy and therefore, in accordance with the provisions of Rule 21.1 of this Court's Rules, the text of these provisions are set forth in Appendix E, *infra*. The pertinent authorities in question are:

1. Article III, Section 2, Clause 3, and the Sixth Amendment of the United States Constitution and Rule 18 of the Federal Rules of Criminal Procedure concerning the place of indictment and trial in criminal proceedings.

2. The Fifth Amendment, United States Constitution, providing for due process of law.

3. Title 18 U.S.C. § 3237, providing for prosecutions where there are continuing offenses and for limited transfers of trials in certain tax related cases.

4. Title 26 U.S.C. § 6531, providing the statute of limitations applicable to prosecutions for tax offenses.

5. Title 26 U.S.C. § 7201, which provides the statute under which Petitioner was prosecuted, though nothing turns on its terms.

STATEMENT OF THE CASE

This case involves the prosecution of the Petitioner, Lowell B. Marchant (hereinafter "Marchant"), pursuant to 26 U.S.C. § 7201, for allegedly evading a part of his personal income tax liability for the years 1977 and 1978.

1. *General Background.*

Since the late 1960s, Marchant and his wife have continually been residents of Mountain Home, Baxter County, Arkansas, within the Wetern District of Arkansas, where Marchant has been involved in the retail and wholesale lumber business through ownership and operation of several Subchapter S corporations. The Government's Indictment (Appendix C, *infra*) alleged that Marchant willfully attempted to evade income taxes for the years 1977 (Count I) and 1978 (Count II) by willfully preparing, signing and filing false income tax returns.

The Marchants signed their 1977 individual income tax return on April 15, 1978, and filed such return by depositing it in the United States mail at Mountain Home, Baxter County, Arkansas (within the Western District of Arkansas), addressed for delivery to the IRS Service Center at Austin, Travis County, Texas (within the Western District of Texas). Their individual income tax return for the year 1978 was similarly signed and filed by them with the IRS by mail from Mountain Home, Arkansas, on April 13, 1979. These returns had been prepared by a certified public accountant, John L. Shock, who maintained his office at Conway, Faulkner County, Arkansas (within the Eastern District of Arkansas).

2. *Tax Return Preparation.*

Mr. Shock, called as a witness for the government, testified at trial that he had prepared all of the individual and corporate returns for Marchant and his corporations for at least seven (7) years, and that he was aware of the scope and conduct

of Marchant's business. The CPA-tax return preparer testified that he annually traveled from his office at Conway, Arkansas, to Marchant's place of business at Mountain Home, Arkansas, where he met with Marchant and his bookkeeper and gathered the financial information and prepared the trial balances needed to complete the Marchants' individual and corporate income tax returns. The CPA testified that he took the information he had gathered in the Western District of Arkansas to his office in the Eastern District of Arkansas to fill out the IRS forms. These completed but unsigned reporting forms were then returned to Marchant with instructions for signing and filing. Mr. Shock testified that Marchant had *never* been in his office in Conway, Arkansas, during the entire seven (7) year period he represented Marchant.

Mr. Shock further testified that the bookkeepers employed by Marchant's corporation were loyal, but that the business' expansion had outgrown their capacity to keep records accurately, and that many year-end adjusting entries had to be made by his accounting firm to keep the records straight. He also testified that Mr. Marchant had problems, as did a number of the accountant's other small business clients, in distinguishing between what was corporate business and what was his personal business. Mr. Shock stated on cross examination that he had prepared the returns from materials supplied or made available by Marchant and his bookkeeper, and he further testified that he was aware (from his tax return preparation for the corporate entities) of a number of categories, e.g. trucking income, airplane, rental income, which the Government alleged were underreported by Marchant.

3. *IRS Investigation.*

On April 16, 1980, four (4) years to the day before the Indictment was returned in this case, Special Agent R. Wayne Beardsley of the Criminal Investigation Division of the IRS made his initial contact with Marchant at his place of business in Mountain Home, Arkansas. The Special Agent served administrative summons upon Marchant for all of the records of

his Subchapter S corporations for the years 1975 through 1980, and, in December of 1982, recommended Marchant's prosecution for certain tax years, including 1977 and 1978. This recommendation was forwarded to the District Counsel's office of the IRS at Kansas City, Missouri, which concurred and forwarded the matter to the Tax Division, Department of Justice in Washington, D.C., on February 8, 1983. In the late summer of 1983, the Tax Division referred the matter to the United States Attorney's office for the Western District of Missouri, Kansas City, Missouri, for further Grand Jury investigation. While this matter was pending in the United States Attorney's office in Kansas City, Missouri, Marchant and his wife took an eleven (11) day trip to Switzerland for purely health and pleasure purposes. The Special Agent testified that this trip did not in any way affect or interfere with the Government's investigation of Marchant and that he was not even aware of the trip until after it had occurred.

In December of 1983, the Tax Division of the Department of Justice referred this case to the United States Attorney's office for the Eastern District of Arkansas, and the prosecutor there subpoenaed Marchant and his employees before the grand jury for the Eastern District of Arkansas on February 21, 1984, requiring them to bring a pickup truck load of corporate records, almost all of which had been given to the Special Agent during the administrative investigation. The bookkeeper at Marchant Lumber Company, Anna Jane Quick, was given a formal grant of immunity and required to testify before the grand jury on that date. However, Donna Sue Clark, a bookkeeper for Plywood Supplies, Inc. (a Missouri corporation in which Marchant had an interest) was voluntarily released from the February 21, 1984 grand jury subpoena by the prosecutor, who again voluntarily released Ms. Clark from a similar grand jury subpoena due to be returned on March 19, 1984. A formal grant of immunity was authorized for Ms. Clark on March 16, 1984, and she finally appeared, pursuant to grand jury subpoena, and testified before the grand jury for the Eastern District of Arkansas on April 16, 1984.

4. *Filing of Complaint and Indictment.*

On Friday, April 13, 1984, Special Agent Beardsley appeared before the Honorable Henry L. Jones, Jr., United States Magistrate for the Eastern District of Arkansas, and swore to a Complaint against Marchant, alleging that Marchant had criminally attempted, "within the *Eastern* District of Arkansas," to evade part of the tax he owed for the year 1977 (Appendix B, *infra*.) This Complaint contains material misstatements of facts, knowingly made by Special Agent Beardsley, since the record clearly establishes that Marchant did not file his return with the District Director at Little Rock, Arkansas, or commit any other act alleged in this Complaint within the *Eastern* District of Arkansas. At the request of the Government prosecutor, no arrest warrant or summons was issued on this Complaint before 11:59 p.m. on April 15, 1984 (exactly six (6) years after Marchant had filed his 1977 individual income tax return).

Subsequently, on Monday, April 16, 1985, six (6) years and one (1) day after Marchant had filed his 1977 return, a two count indictment (Appendix C, *infra*) was returned against Marchant at Little Rock, Arkansas, by the then sitting Grand Jury for the Eastern District of Arkansas. This Indictment states that all criminal acts alleged on the part of Marchant were committed in the Eastern District of Arkansas. It was upon this indictment that the case was submitted to the jury.

5. *Procedural Actions.*

Following his arraignment in the Eastern District of Arkansas, Marchant filed timely Motions to Dismiss both the Complaint and the Indictment in the Eastern District of Arkansas, alleging that the District Court for the Eastern District of Arkansas lacked both subject matter and personal jurisdiction over him with regard to the crimes alleged, and, alternatively, that Count I of the Indictment should be dismissed as being untimely filed one (1) day beyond the expiration of the statute of limitations for prosecution provided by 26 U.S.C. § 6531.

Because the twenty (20) day period provided by 18 U.S.C. § 3237(b) was about to expire, Marchant also filed a Motion to Transfer this case to the Harrison Division, Western District of Arkansas, based *partially*, but not totally, upon the provisions of 18 U.S.C. § 3237(b). Though Marchant requested that his substantive Motions to Dismiss be ruled upon prior to the District Court's considering the merits of the Motion to Transfer, the Honorable Elsijane T. Roy of the Eastern District of Arkansxas entered an Order on June 7, 1984, transferring this case to the Western District of Arkansas. Upon the transfer being effectuated, the Honorable H. Franklin Waters, Chief Judge for the Western District of Arkansas, held a hearing on July 27, 1984, on Marchant's Motions to Dismiss the Complaint and the Indictment whereat he received evidence and heard argument from both the government and Marchant. At the close of that hearing, Judge Waters orally denied both Motions. Judge Waters also subsequently denied Marchant's Motions for Judgment of Acquittal made at the close of all the evidence (before submission of the case to the jury) and his post-trial Motion for Judgment of Acquittal, all of which were based upon the same facts and arguments raised in Marchant's pre-trial Motions to Dismiss.

6. *Jury Instructions Regarding Reliance on CPA.*

As noted above, Mr. Shock, the certified public accountant who prepared the Marchants' returns, testified that he had worked with both Marchant and the corporate bookkeepers, and that he was generally aware of the Defendant's business operations, including some of the sources of income claimed to be understated by the Government. Marchant and his wife both testified that they had relied upon Mr. Shock and the bookkeepers to correctly prepare the corporate and personal returns, and that, in reliance upon their preparation by Mr. Shock, they thought the personal returns for the years 1977 and 1978 were correct when they signed and mailed these returns to the Internal Revenue Service.

Based upon this testimony, Marchant proffered Defendant's Requested Jury Instruction No. 17 (Appendix D, *infra.*) in which he requested the District court to instruct the jury of his "reliance" upon Mr. Shock to prepare a correct income tax return for him. This instruction would therefor bear on the question of his willfulness, which element of proof was inherent in the Government's evidence of understatements of income. Judge Waters refused to give the Defendant's Requested Instruction No. 17, and in fact, refused to give any instruction concerning "reliance" of the Defendant upon the tax return preparer (Appendix D, *infra.*)

7. *Result of Case.*

After a five (5) day trial, this case was submitted to the jury at Harrison, Arkansas, which returned two verdicts of guilty at the close of the case on October 5, 1984. Marchant's Motions for New Trial, Judgment of Acquittal, and Arrest of Judgment were all denied by Judge Waters, and the Defendant was sentenced on January 23, 1985, to one (1) year of incarceration on Count I and fined $10,000 and placed on three (3) years probation on Count II of the Indictment. Judge Waters granted Marchant's Motion to Stay the Judgment and Order of Commitment, pending appeal, having found that there were substantial questions of fact and law raised on appeal which, if decided in Defendant's favor, would likely result in reversal or an order for a new trial. The District Court's Judgment and rulings were affirmed by the Court of Appeals for the Eighth Cirucit in its opinion of *United States v. Marchant*, Docket No. 85-1191, 774 F.2d 888, Appendix A, *infra.* This Petition for Writ of Certiorari is being filed from the circuit court's judgment affirming Marchant's conviction and the procedural rulings of the district court.

EXISTENCE OF JURISDICTION BELOW

The district court's subject matter jurisdiction is contested by the Petitioner. The Court of Appeals' juridiction to review this matter was based upon the provision of 28 U.S.C. § 1291.

ARGUMENT

1. *Jurisdiction and Venue.*

The Government was obviously "forum shopping" in its attempt to prosecute Marchant in a district other than the Harrison Division of the Western District of Arkansas, within which the Defendant has continually resided for many years. Though the indictment in this case (Appendix C, *infra*,) alleges that all of the acts committed by Marchant in attempting to willfully evade taxes in violation of 26 U.S.C. § 7201 occurred in the *Eastern* District of Arkansas, the evidence produced by the Government at trial failed to prove that Marchant "attempted" to commit *any* act within the Eastern District of Arkansas. Since the Government did not choose to file a superceding indictment against Marchant in either the Western Districts of Arkansas or Texas (the only districts where venue could properly lie), the indictment in this case should have been dismissed or the Defendant's post trial Motion for Judgment of Acquittal (made after he was placed at jeopardy) should have been granted. This decision by the Eighth Circuit represents a departure from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision.

The verb "attempt," as used in 26 U.S.C. § 7201, implies that some affirmative act is required of the Defendant. *Spies v. United States*, 317 U.S. 492 (1943). Since there is absolutely no evidence whatsoever of any "affirmative" act by Marchant in the Eastern District of Arkansas to "attempt" to willfully evade taxes, the District Court for the Eastern District of Arkansas lacked subject matter jurisdiction over the offense charged. For the Eastern District of Arkansas to have had subject matter jurisdiction, under the facts established in this record, the government would have had to have alleged that the CPA-tax return preparer, Mr. Shock, had, in some way, conspired with Marchant to allegedly evade or defeat tax owed by Marchant to the government or aided and abetted in the filing of a false return for the years 1977 and 1978. Without such allegations about the accountant in the indictment, the government has

stretched the jurisdictional and venue requirements of the Sixth Amendment and Rule 18 of the Federal Rules of Criminal Procedure beyond their breaking point.

Mr. Shock was, at the time he prepared the returns in question, engaged as an independent contractor performing a professional service. He was not an agent of Marchant and Marchant did not in any way instruct him in how or where the returns were to be prepared. The fact that Marchant retained an accountant who fortuitously officed in the Eastern District of Arkansas did not cause the crime alleged against Marchant to be a "continuing offense" in that district, under the provisions of 18 U.S.C. § 3237(a). The Eighth Circuit erroneously held that there was a "continuing offense," here because –

> Marchant permitted his accountant to carry false information into the Eastern District and there to prepare and attest returns understating Marchant's tax liability. Marchant therefore propelled a force into the Eastern District as surely as if he had personally prepared the returns in that district. Although Marchant's violation of § 7201 was completed in another district, it was set in play within the Eastern District.

No other court has ever gone this far in expanding the government's choice of districts within which to prosecute. This is the first court to hold that the independent accountant's "ministerial" acts of completing the tax forms within the district (which acts were mechanical or clerical in nature) are, in and of themselves, sufficient to create subject matter jurisdiction and venue in that district for a crime alleged against the taxpayer, and not the accountant.

Several district courts have rightfully rejected the government's unwarranted attempts to broaden the traditional parameters of venue and subject matter jurisdiction where tax related offenses are involved and the government has alleged the acts constitute "continuing offenses." See, *United States v. Hurwitz*, 573 F.Supp. 547, 551 (S.D.W.Va., 1983) and *United*

States v. Sweig, 316 F.Supp. 1148, 1159-1160 (S.D.N.Y., 1970). However, if this decision is allowed to stand (where venue is to be determined based solely upon the situs of the CPA's office), then taxpayers will be forced to defend themselves in districts other than the one in which they reside in the future, because of the amendment to 18 U.S.C. § 3237(b) by § 162 of the Tax Reform Act of 1984, Pub. Law 98-369. [1]

Though this Court's decision in *United States v. Johnson*, 323 U.S. 273 (1944) is often cited for its language that a continuing offense *may* extend over the whole area through which force is propelled by an offender, the Eighth Circuit's approval of the government's "forum shopping" activities in this case are completely at odds with the whole tenor and rationale of this Court's opinion in *Johnson*. In that case, this Court held (in determining venue under a mail fraud type statute) that Congress may provide that the locality of the crime shall extend over the whole area through which the force propelled by the offender operates, but that that theory is at variance with the entire historical development of vicinage

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Since the government's alleged basis for subject matter jurisdiction in the Eastern District of Arkansas in this case does not rest "solely" upon the Defendant's mailing of the tax return to the IRS, then a motion to transfer to the Defendant's home district under the provisions of 18 U.S.C. § 3237(b) would not now be granted. See the wording change in this statute, Appendix E, *infra*, and the explanation contained in the Jt. Comm. Rep. on Public Law 98-369, 98th Cong. 2d Sess. at 517-518. Therefore, the Eighth Circuit's apparent finding in footnote 5 of the Opinion of "no harm-no foul," because the case was tried in the district in which Marchant resided, will no longer be a possibility for similar taxpayers charged with tax evasion. If this decision is allowed to stand, the government will have all the options and the defendant will have none. Though the Joint Committee explanation (at 518) states that the government may have valid reasons for bringing a prosecution in a district other than the one in which the defendant resides, no reason other than "forum shopping" to achieve a more favorable prosecution can be found in this case. Such action on the part of the government is unwarranted and it is even at direct variance with the IRS' published policy on such matters, as set forth in the *Special Agent's Handbook*, Internal Revenue Manual, 9781 Chapter 700, § 727 Venue (reproduced at Worksheet 23, Tax Management Portfolio, No. 163, *Criminal Tax Procedure - Part II*, pgs. B-88-89).

under Article III, Section 2, Clause 3, and the Sixth Amendment of the United States Constitution. There, this Court stated (323 U.S. 275-276):

> [P]lainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. *It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.*
>
> These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rest. These are important factors in any consideration of the effective enforcement of the criminal law. They have been adverted to, from time to time, by eminent judges; and Congress has not been unmindful of them. *Questions of venue in criminal cases, therefore are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed.* (Emphasis added).

Congress has never specifically attempted to declare what acts constitute an "attempt" to evade tax, for purposes of a continuing offense classification. However, a number of cases (cited in The Eighth Circuit's opinion), [2] which were all decided before the 1966 amendment to 26 U.S.C. §§ 6091 and 7502 (which statutes provide that tax returns can be filed with IRS Service Centers and that timely mailing constitutes timely "filing"), held that a charge of tax evasion could be brought and tried in the district where the defendant attempted to defeat the tax by preparing the return, not just where the return was filed with the IRS. However, none of these cited cases hold that

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United States v. King, 463 F.2d 559, 462 (C.A. 3, 1977), *cert. denied*, 435 U.S. 918 (1978); *United States v. Gross*, 276 F.2d 818, (C.A.2), *cert. denied*, 363 U.S. 831 (1960); *Holbrook v. United States*, 216 F.2d 238 (C.A. 5, 1954), *cert. denied*, 349 U.S. 915 (1955); *United States v. United States District Court*, 209 F.2d 575 (C.A. 6, 1954); and *United States v. Goldberg*, 206 F.Supp. 394 (E.D. Pa., 1962), *aff'd*, 330 F.2d 30 (C.A. 3), *cert. denied*, 377 U.S. 953 (1964).

the mere preparation of a tax return in a district by an accountant engaged to perform that professional service (where the defendant never entered or sent information into that district) is sufficient to meet the Sixth Amendment's requirement that a taxpayer charged with willfully attempting to evade taxes is to be indicted and tried only in the state and district where the offense was committed.

An indictment is jurisdictional in nature, and where an indictment is void, there is nothing for the Court to try. *Ex parte Bain* 121 U.S.1 (1887). Further, if the indictment is invalid, it does not matter whether the Court had jurisdiction of the person or of the crime, since once the indictment is void, the jurisdiction of the offense is gone and the Court has no further right to proceed in the case. *Id.* An indictment is a finding of a Grand Jury, under oath, and an indictment cannot be amended without the concurrence of the Grand Jury by whom the bill is found. *Russell v. United States*, 369 U.S. 749, 770 (1962) and *Stirone v. United States*, 361 U.S. 212 (1960).

Marchant preserved his rights to contest the lack of subject matter jurisdiction within the Eastern District of Arkansas by requesting that the district court rule first on the "substantive" matters raised by these motions before acting upon the motion to transfer. Since the Government has never sought to indict Marchant in the Western Districts of either Arkansas or Texas (the only districts which, under the stated facts, could rationally have subject matter jurisdiction over any "attempt" by Marchant to evade taxes), the Government has chosen to stand by its faulty indictment in this case, and its case must therefore fall with it.

In *Salinger v. Loisel*, 265 U.S. 224, 232 (1923), this Court stated:

> it must be conceded that, under the Sixth Amendment to the Constitution, the accused cannot be tried in one district on an indictment showing that the offense was not committed in that district.

That is exactly the situation here, because the Indictment (Appendix C, *infra*) still alleges that all of the acts performed by Marchant in attempting to evade tax occurred in the Eastern District of Arkansas, while the government's proof established that all of Marchant's affirmative acts were taken in the Western District of Arkansas. Since the government failed to prove its allegations set out in the Indictment, Marchant's post trial Motion for Judgment of Acquittal should have been granted.

Accordingly, this Court should grant this petition for a writ of certiorari and use this case as a vehicle to exercise its power of supervision over the lower Courts to stop the government's unwarranted and unconstitutional attempt to broaden its jurisdictional and venue options in all tax cases for "forum shopping" purposes. The basic unfairness of this decision and the callous attitude of the government toward the rights of citizens it charges with tax crimes constitutes a clear abuse of the constitutional guarantees of the Sixth Amendment which bars the government from seeking to prosecute tax cases only in forums it deems favorable to prosecution. Such actions by the government must not be allowed to stand in light of this Court's longstanding admonitions on this point, as so eloquently stated in *United States v. Johnson*, *supra*.

2. *Jury Instruction and Theory of Defense.*

The Eighth Circuit's failure to find that Marchant's Motion for a New Trial should have been granted, because of the district judge's erroneous refusal to give the requested instruction concerning the taxpayer's "reliance" upon a competent tax return preparer, was reversible error. This decision by the Eighth Circuit is in direct conflict with decisions of the United States Court of Appeals for the Fifth Circuit in *Bursten v. United States*, 395 F.2d 976 (C.A.5, 1968) and the Fourth Circuit in *United States v. Mitchell*, 495 F.2d 285 (C.A.4, 1974). Both the Fifth and Fourth Circuits have consistently ruled that in a tax evasion case it is reversible error to refuse to give a requested jury instruction regarding willfulness and reliance upon a com-

petent tax return preparer. When an evidentiary basis has been presented that the tax return preparer had adequate knowledge of the defendant's finances and that the defendant relied upon the competent tax return preparer to correctly record the income on the reporting form, these two circuit courts will reverse and remand for a new trial where such instruction is refused by the trial judge.

Here, the evidentiary record established that Mr. Shock, the CPA-tax return preparer, had represented not only the Defendant but all of his corporations for a seven (7) year period, during which period he testified that he had acquired knowledge of many of the activities which the Governmennt claims were the source of the unreported income. Marchant and his wife both testified that they relied upon the return preparer to prepare a correct return, and that they believed he was competent and that the returns were true and correct when they signed and filed them with the IRS. On this evidentiary basis, Marchant, or any similarly situated defendant, is entitled, as a matter of law, to the instruction requested as his theory of defense.

The requested instruction is a standard instruction set out in Devitt & Blackmar, Fed. Jury Instr., 3rd Ed. § 35.18, and the district judge's few reasons for refusing to give the Defendant's Requested Instruction No. 17 (Appendix D, *infra*) were not adequate for the circuit court to sustain his refusal. Marchant is entitled to a new trial where this instruction should be given. Failure to give the instruction uniformly undermines a key element of the defendant's theory of defense, i.e. lack of willfulness.

Though the Eighth Circuit has seemingly acknowledged the requirement that such an instruction must be given, that court has created an exception where the tax return preparer is deemed not to be "competent." *United States v. Farber*, 630 F.2d 569 (C.A.8, 1980). However, that exception finds no applicability in the evidentiary record established in this case. Also, the Eighth Circuit adopted a procedure in this case, and to some extent in its decision in *United States v. White*, 671

F.2d 1126 (C.A.8, 1982), where it refuses to mention, discuss or describe the substance of questioned jury instructions in tax cases, so that its rulings will not appear to be in conflict with similar decisions of other federal circuits that have considered similar matters. Such practice must not be allowed to catch hold in this circuit and this Court should so order.

Here, Marchant was entitled to the instruction concerning his "reliance" upon the tax return preparer, which instruction bears directly upon the question of wilfullness under 26 U.S.C. § 7201. The district court's failure to give such instruction, and the Eighth Circuit's refusal to reverse that error and order a new trial, creates a situation where the federal law in the Eighth Circuit is administered differently than it is in the Fourth and Fifth Circuits. This Court should use this case as a vehicle to exercise its power to supervision to make the law on this point consistent among the circuits.

3. *Statute of Limitations on Prosecution.*

The Eighth Circuit's interpretation of the 1954 amendment to the statute of limitations contained in 27 U.S.C. § 6531 reaches a result that is at odds with this Court's continuing admonition that statutes of limitation should be liberally construed in favor of repose. *Toussie v. United States*, 397 U.S. 112, 115 (1970) and *United States v. Scharton*, 258 U.S. 518, 522 (1932). The six (6) year statute of limitations contained in 26 U.S.C. § 6531, as interpreted by the Eighth Circuit, would place citizens accused of bank robbery or kidnapping in a preferred position to those charged with tax offenses. Because of this determination, this Court should grant certiorari and set guidelines on this important matter to insure that similarly situated citizens secure the same privileges and the equal protection of the laws as required by the due process clause of the Fifth Amendment.

The Eighth Circuit's holding that the eleven (11) day pleasure and health trip abroad by the Marchants tolled the running of the statute of limitations (which trip in no way interfered with the government's investigation of them)

represents a strict and literal interpretation of the statute's wording, which interpretation does not meet the legislative purpose. This Court has consistently required the lower courts to closely examine the legislative intent behind statutes to see that the legislative purpose is met by their interpretation. See, *Holy Trinity Church v. United States*, 143 U.S. 457, 460-461 (1892) and *Sorrells v. United States*, 287 U.S. 435, 446 (1932).

The purpose for this congressional change in the tax law in 1954 was adroitly examined and discussed by Professor James R. Carrigan of New York University in his article, *Tax Crimes-Statute of Limitations-Tolling Provisos*, 11 Tax. L. Rev. 137 (1956). This article was brought to the attention of the Eighth Circuit by Marchant, but its analysis and rationale seem to have been totally ignored by the circuit court in reaching its decision here. In the cited article, Professor Carrigan thoroughly analyzed the historical background of the statute (from its inception in 1884) and persuasively argues that those thought to be guilty of tax violations should at least be given the same privileges of kidnappers and bank robbers. He argues that the provision of "outside the United States," when used in 26 U.S.C. § 6531, should be equated to the similar provision in its statutory forerunner of "absent from the district." [3]

Prior to this 1954 amendment, a line of cases developed which granted a liberal and common sense approach to the interpretation of the term "absent from the district." [4] These cases created a logical exception to the tolling provision of the statute where the defendant's trips "outside" the district were strictly for personal business or pleasure purposes. As noted by Professor Carrigan, *supra*, at 154, and as also noted by the trial

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[3] See, Carrigan, *supra*, 11 Tax L.Rev., at 147-148.

[4] These decisions are exemplified by *United States v. Mathis*, 28 F.Supp. 582 (D.C.N.J., 1939); *United States v. Eliopoulos*, 45 F.Supp. 777 (D.C.N.J., 1942); *United States v. Beard*, 118 F.Supp. 287 (D.C.Md., 1954); and *United States v. Gross*, 159 F.Supp. 316 (D.C.Nev., 1958).

judge in this case, by adopting a strict and literal interpretation of the wording "outside the United States" may cause trial judges to become unthinking automations in the application of the statute.

Marchant's right to due process was denied by the Eighth Circuit's interpretation of 26 U.S.C. § 6531 in this matter. The indictment was returned one (1) day after the expiration of the applicable statute of limitations. The faulty wording of the Complaint filed by the special agent (Appendix B, *infra*), especially when coupled with the Magistrate's failure to authorize the issuance of either an arrest warrant or a summons, prior to the expiration of the statute of limitations, clearly causes the action by the government personnel to have failed to meet the requirements for triggering the tolling provisions of the statute as set forth by this Court in *United States v. Jaben*, 381 U.S. 214 (1965). The Complaint was merely "filed" and no finding of probable cause was made. See also, the comment of Justice Blackmun in his dissent in the denial of certiorari in *United States v. Miller*, 419 U.S. 970 (1974).

Accordingly, this Court should grant certiorari and reverse the Eighth Circuit's erroneous interpretation of the tolling provisions of 26 U.S.C. § 6531, so as to clarify an important question of federal law that has not yet been ruled upon directly by this Court. The adoption of a common sense exception to the tolling provisions for trips "outside the United States" for strictly personal business or pleasure purposes should be implemented, since the actions of this defendant or others similarly situated would in no way interfere with government's investigation of them for alleged tax violations. The fortuitous event of merely being "outside the United States" sometime during the six (6) year period should not deny the defendant the right to claim the benefit of the six (6) year statute of limitations on prosecution. This Court stated in *McNabb v. United States*, 318 U.S. 332, 347 (1943), "the history of liberty has largely been the history of observance of procedural safeguards," and it is never more true than in this type of situation.

CONCLUSION

For any or all of the reasons set forth in this Petition, the Court should grant Marchant's petition for a writ of certiorari to clarify the federal laws on these three important questions affecting the administration of this country's taxing statutes. This case presents an excellent vehicle for this Court to exercise its power of supervision to clarify the law and to (1) eliminate the conflict between the decision of the Eighth Circuit and those of its sister circuits, and (2) stop the shameful "forum shopping" being conducted by the government in tax related cases.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 85-1191

United States of America,	*	
	*	
Appellee,	*	Appeal from the United
	*	States District Court for
v.	*	the Western District of
	*	Arkansas.
Lowell B. Marchant,	*	
	*	
Appellant.	*	

Submitted: June 13, 1985

Filed: October 4, 1985

Before ROSS, Circuit Judge, BRIGHT, Senior Circuit Judge, and NICHOL,* Senior District Judge.

BRIGHT, Senior Circuit Judge.

The grand jury indicted Lowell B. Marchant on counts of wilfully attempting to evade income tax in the years 1977 (Count I) and 1978 (Count II) and placed the location of those offenses in the Eastern District of Arkansas. The district

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*The HONORABLE FRED J. NICHOL, Senior United States District Judge for the District of South Dakota, sitting by designation.

court in that district transferred the case for trial to the Western District of Arkansas. [1] After conviction on both counts in a jury trial, Marchant appeals the convictions, asserting the following contentions: (1) the district court erred in denying his pre-trial motion to dismiss and his trial motion for acquittal for a lack of subject matter jurisdiction on grounds that the conduct relating to the charge occurred in the Eastern District of Arkansas; (2) the district court erred in failing to dismiss Count I of the indictment as barred by the six-year statute of limitations; (3) the district court erred in admitting evidence of prior wrongful acts and in other evidentiary rulings; (4) the district court erred in its instructions to the jury in not presenting Marchant's theory of the case; (5) the district court erred in failing to discharge an allegedly incompetent juror; and (6) the district court erred in denying Marchant a new trial.

We consider these contentions against the framework of the evidence and procedural history of the case.

I. BACKGROUND.

During the relevant tax years, 1977 and 1978, Marchant and his wife resided in Mountain Home, which is in the Western District of Arkansas. The Marchants held substantial interests in several business entities, including some Subchapter S corporations, located in Arkansas, Missouri, and Oklahoma. In 1980, the Government began investigating the Marchants' personal tax liability, as well as that of their businesses. On Monday, April 16, 1984, a grand jury returned a two-count indictment, charging Marchant with attempting to evade or defeat a large portion of his 1977 and 1978 income tax by "preparing and causing to be prepared, by signing and causing to be signed, and mailing and causing to be mailed in the

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The Honorable Elsijane T. Roy, United States District Judge for the Eastern District of Arkansas heard pretrial matters. Chief Judge H. Franklin Waters of the United States District Court for the Western District of Arkansas presided at the trial.

Eastern District of Arkansas, a false and fraudulent tax return" in violation of 26 U.S.C. § 7201.

Trial was set in the Eastern District of Arkansas. Marchant entered pretrial motions to dismiss the complaint and indictment for a lack of venue. Preserving these motions, Marchant requested transfer of the case to the Western District of Arkansas under 18 U.S.C. § 3237(b) (1982). The district court duly granted the motion to transfer, but did not rule on the motions to dismiss. After hearing arguments and taking evidence, the District Court for the Western District of Arkansas denied the motions, and the case proceeded to trial before a jury.

At trial, the Government introduced evidence showing that Marchant omitted substantial receipts of money from his 1977 and 1978 tax returns, including interest received on loans, rent received on a building lease, and income received by diverting money to himself from other business entities. After a five-day trial, the jury returned guilty verdicts on both counts of the indictment. The district court sentenced Marchant to one year in jail and assessed a fine of $10,000 on Count I and gave Marchant three years' probation on Count II. The court stayed its judgment pending this appeal.

II. DISCUSSION.

A. Venue.

Marchant first contends that, because he engaged in no conduct relating to the filing of his returns in the Eastern District of Arkansas, that district acquired no jurisdiction over the crime, and that infirmity extended to the actual place of trial on transfer. Indeed, the Government offered no proof that Marchant was even in the district during the relevant time periods. The Government asserts, however, that proof of the preparation of Marchant's tax returns by an accountant within the Eastern District established proper venue there, as well as subject matter jurisdiction.

The Constitution and the federal laws of the United States grant persons the right to be tried in the judicial district in which their offense occurred. U.S. Const. Art. III, § 2; U.S. Const. amend. VI; Fed. R. Crim. P. 18. Questions of venue "are not merely matters of formal legal procedure," but raise "deep issues of public policy." *United States v. Johnson*, 323 U.S. 273, 276 (1944); *Holdridge v. United States*, 282 F.2d 302, 305 (8th Cir. 1960). The Government must prove venue in criminal cases by a preponderance of the evidence. *United States v. Netz*, 758 F.2d 1308, 1312 (8th Cir. 1985).

In many instances, all aspects of an offense are not committed within a single district. For these "continuing offenses," 18 U.S.C. § 3237(a) (1982) provides that "* * * any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." Under this statute, the locality of a crime for the purpose of venue extends "over the whole area through which force propelled by an offender operates." *United States v. Johnson*, *supra*, 323 U.S. at 275.

The crime of wilfully attempting to evade or defeat tax liability is completed when the taxpayer files the tax return with the Internal Revenue Service. *See United States v. Habig*, 390 U.S. 222, 223 (1968). Obviously, the taxpayer cannot file the return until it is prepared, signed, and mailed. These preliminary steps often occur in districts other than that in which the taxpayer files the return. In such cases, courts recognize that the violation of section 7201 is a "continuing offense," and the Government can prosecute the taxpayer in the district where the return was prepared, signed, mailed, or filed. *See, e.g., United States v. King*, 563 F.2d 559, 562 (2d Cir. 1977), *cert. denied*, 435 U.S. 918 (1978); *United States v. Gross*, 276 F.2d 816, 818 (2d Cir.), *cert. denied*, 363 U.S. 831 (1960); *Holbrook v. United States*, 216 F.2d 238, 239 (5th Cir. 1954), *cert. denied*, 349 U.S. 915

(1955); *United States v. United States District Court*, 209 F.2d 575 (6th Cir. 1954); *United States v. Goldberg*, 206 F. Supp. 394, 397 (E.D. Pa. 1962); *aff'd*, 330 F.2d 30 (3d Cir.), *cert. denied* 377 U.S. 953 (1964).

Here, Marchant signed and mailed his tax returns in the Western District of Arkansas. Only his accountant's preparation of the returns occurred in the Eastern District. However, Marchant permitted his accountant to carry false information into the Eastern District and there to prepare and attest returns understating Marchant's tax liability. Marchant therefore propelled a force into the Eastern District as surely as had he personally prepared the returns in that district. Although Marchant's violation of section 7201 was completed in another district, it was set in play within the Eastern District. Consequently, it was a "continuing offense," and, under 18 U.S.C. § 3237(a), venue was proper in the Eastern District. [5]

B. Statute of Limitations.

Marchant also contends that Count I of the indictment, dealing with his 1977 tax return, is barred by the six-year statute of limitations, 26 U.S.C. § 6531(2) (1982). Marchant filed his 1977 tax return on April 15, 1977, and the grand jury returned its indictment on April 16, 1984. The district court held that the indictment was timely because Marchant's eleven-day health and pleasure trip to Switzerland in 1983 tolled the statute of limitations for that period of time.

Section 6531 provides that "the time during which the person committing any of the various offenses arising under the internal laws is outside the United States * * *

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In any event, by obtaining transfer of the case to the district of his residence, Marchant avoided any hardship that might be attendant to the trial of that case in a distant district.

shall not be taken as any part of the time limited by law for the commencement of such proceedings." 26 U.S.C. § 6531 (1982). Marchant argues that the legislative history of this tolling provision indicates that "outside the United States" does not include health and pleasure trips. The Government advocates a strict construction of the phrase, such that Marchant's trip "outside the United States" tolled the statute of limitations for the eleven days.

As originally proposed by the House of Representatives in 1884, the tolling provision applied only to persons "beyond the reach of legal process." H.R. 6370, 48th Cong., 1st Sess., 15 Cong. Rec. 3097 (1884). A Senate Committee changed this language, however, to apply to persons "absent from the district" where the offense occurred. *See* H.R. 6370, 48th Cong., 1st Sess., 15 Cong. Rec. 5770 (1884). The bill passed with its altered language, 26 U.S.C. § 3748 (1939) (originally enacted as Act of July 5, 1884, ch. 225, 23 Stat. 122 (1884)).

The legislative history of the tolling provision does not reveal the purpose underlying the substitution of "beyond the reach of legal process" for "absent from the district." Congress' apparent intent was to draft the statute in language similar to that in comparable state civil provisions. *See* Wolfgram, *Tolling the Statute of Limitations in a Criminal Tax Case*, 28 Taxes 53, 55 n.15 (1950), Note, *Limitation of Actions—Tolling of Period—Criminal Tax Statute Tolled Where Defendant Who Was "Absent From the District" Never Resided Therein*, 66 Harv. L.Rev. 1323, 1323 (1953). Indeed, in 1884, the substance was not changed by the alteration. At that time, a federal court's jurisdiction extended only to the boundaries of the district in which it sat. Consequently, a warrant or summons was effectively served only within the district from which it issued. *See, e.g., Weinberg v. United States*, 126 F.2d 1004, 1006 (2d Cir. 1942); *Mitchell v. Dexter*, 244 F. 926 (1st Cir. 1902). Therefore, a person who was "absent from the district" in 1884 was "beyond the reach of legal process."

In 1946, Congress adopted what is now Fed. R. Crim. P. 4(d)(2), which expressly permits federal criminal process "at any place within the jurisdiction of the United States." "Absent from the district" thus became no longer synonymous with "beyond the reach of legal process." In 1954, however, Congress amended the tolling provision to include its present triggering language, "outside the United States." 26 U.S.C. § 6531 (originally enacted as Act of Aug. 16, 1954, ch. 736, 68A Stat. 815 (1954)). We interpret this amendment as returning the provision to its original meaning of "beyond the reach of legal process." Therefore, persons are "outside the United States" whenever they cannot be served criminal process within the jurisdiction of the United States under Fed. R. Crim. P. 4(d)(2). Consequently, Marchant's trip to Switzerland tolled the statute of limitations for eleven days because during that time he was safe from criminal process. The limitations period of section 3237(a) therefore ran until April 26, 1984, rendering Count I of the April 16, 1984 indictment timely. [7]

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Marchant also claims that, even if the indictment was timely, the four-year delay between the initiation of the Government's investigation on April 16, 1980 and the indictment on April 16, 1984 constitues prosecutorial dilatoriness in violation of his due process rights. To prevail on this claim, Marchant must show that the Government intentionally delayed seeking an indictment to gain tactical advantage and that the delay substantially prejudiced his defense. *United States v. Lovasco*, 431 U.S. 783, 788-90 (1977); *United States v. Marion*, 404 U.S. 307, 322-24 (1971); *United States v. Bliss*, 735 F.2d 294, 300-01 (8th Cir. 1984); *United States v. Wells*, 702 F.2d 141, 143 (8th Cir. 1983). Marchant failed to recite and we have been unable to find any evidence to support Marchant's claim. The Government's investigation was multifaceted, probing not only Marchant's personal tax liability, but also that of his numerous businesses. The complexity of the investigation undertaken by the Government justified its delay in seeking indictment. Nothing in the record reveals that the Government intentionally timed the admittedly eleventh-hour indictment to gain some tactical advantage. Furthermore, Marchant has failed to demonstrate any prejudice, such as a resulting loss of evidence or unavailability of witnesses. *See United States v. Bliss, supra*, 735 F.2d at 301; *United States v. Wells, supra*, 702 F.2d at 143. Therefore, we must reject Marchant's contention that preindictment delay denied him due process.

C. Admissibility of Evidence of Prior Wrongful Acts.

Marchant additionally argues that the district court improperly allowed the Government to question him on certain 1977 and 1978 house sales, the proceeds of which were not reported on his tax returns for the corresponding years. During cross-examination by the Government, Marchant testified that a check attached to one of the defense exhibits represented proceeds from the sale of his home. He explained that the amount of the check was not reported on his tax return because his accountant had indicated that such amounts were not taxable income. He further testified that he did not recollect omitting any other large amounts from his returns. The Government then began to question Marchant on other unreported house sales made during 1977 and 1978. The district court had barred the Government from pursuing the issue of the house sales during the Government's case because the Government had agreed prior to trial not to present "any evidence of unreported income from house sales in its case in chief." When the matter arose during cross-examination of Marchant, the court ruled the evidence admissible under Rule 404(b) of the Federal Rules of Evidence. The court also specifically found that the probative value of the evidence outweighed any unfair prejudicial effect and, therefore, was not excluded by Rule 403.

We observe that the Government's promise not to present evidence of the house sales during its case-in-chief did not obligate it to refrain from using that evidence in cross-examining the defendant during presentation of the defense. We also affirm the district court's rulings that the evidence was admissible under Rule 404(b) and not excluded by Rule 403.

Rule 404(b) excludes evidence of prior wrongful acts when offered to prove that the defendant acted in conformity therewith. Fed. R. Evid. 404(b). The rule permits introduction of this evidence for other purposes, however, such as proving "motive, opportunity, intent, preparation,

plan, knowledge, identity, or absence of mistake or accident." *Id.* This court has held that evidence of prior wrongful acts is admissible under Rule 404(b) when (1) an issue is raised on which evidence of other crimes may be received; (2) the proffered evidence is relevant to that issue; (3) the evidence is clear and convincing; and (4) the prior acts relate to wrongdoing similar in kind and reasonably close in time to the charge at trial. *United States v. Burchinal*, 657 F.2d 985, 993 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); *United States v. Frederickson*, 601 F.2d 1358, 1365 (8th Cir.), *cert. denied*, 444 U.S. 934 (1979). The trial court has wide discretion in ruling on the admissibility of prior wrongful acts. *United States v. Burchinal*, *supra*, 657 F.2d at 993.

In this case, the Government bore the burden of proving that Marchant intended to evade or defeat his 1977 and 1978 income taxes. Marchant's testimony that he had excluded the sale proceeds from his home on his accountant's advice and that he recalled omitting no other large omitted amounts placed the question of intent directly in issue. We conclude that the other house sales made during 1977 and 1978 bore on Marchant's intent and knowledge, issues on which evidence of prior wrongful acts can be received. *See United States v. Young*, 618 F.2d 1281, 1289 (8th Cir.), *cert. denied*, 449 U.S. 844 (1980); *McConkey v. United States*, 444 F.2d 788, 790 (8th Cir.), *cert. denied*, 404 U.S. 885 (1971); *United States v. Prionas*, 438 F.2d 1049, 1054 (8th Cir.), *cert. denied*, 402 U.S. 977 (1971). Further, the omissions of the sale proceeds occurred during the same years as those omissions resulting in Marchant's indictment. Therefore, the evidence of the house sales met the requirements for admissibility under Rule 404(b). Additionally, it cannot be said that the district court abused its discretion in ruling that the prejudicial effect of the evidence did not outweigh its probative value. *See* Fed. R. Evid. 403. Finally, the evidence properly served to impeach Marchant's direct testimony.

D. Instructions.

Marchant asserts that the district court denied him the right to present his theory of the defense by refusing to give several requested jury instructions. A defendant in a criminal case is entitled to a specific instruction on his or her theory of the case if the requested instruction contains a correct statement of the law and is supported by evidence. *See, e.g., United States v. White*, 671 F.2d 1126, 1131 (8th Cir. 1982); *United States v. Brake*, 596 F.2d 337, 339 (8th Cir. 1979); *United States v. Hill*, 589 F.2d 1344, 1352 (8th Cir.), *cert. denied*, 442 U.S. 919 (1979); *United States v. Rabbitt*, 583 F.2d 1014, 1024 (8th Cir.), *cert. denied*, 439 U.S. 1116 (1979). The district court, however, is free "to use its own language in framing instructions." *United States v. Nance*, 502 F.2d 615, 619-20 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975). The charge to the jury must adequately and correctly cover the substance of the requested instructions, but need not mimic the requested language. *See, e.g., United States v. Brake, supra*, 596 F.2d at 339; *United States v. Hill, supra*, 589 F.2d at 1352; *United States v. Rabbitt, supra*, 583 F.2d at 1024; *United States v. Nance, supra*, 502 F.2d at 619. Moreover, the court may properly refuse to submit instructions on issues not in dispute at trial. *United States v. White, supra*, 671 F.2d at 1131.

In this case, the instructions to the jury adequately advised the jury on the substance of most of Marchant's proffered instructions. The court properly rejected Marchant's other tendered instructions not covered by its charge as relating to matters not in dispute, not supported by the facts, or irrelevant. The instructions adequately informed the jury of Marchant's theory of defense and enabled his counsel to make an adequate argument on the basis of that theory. Accordingly, we reject Marchant's contentions of error on instructions to the jury.

E. Competency of Juror.

Finally, Marchant contends that the district court erred in failing to excuse a juror whose grandfather was dying. After its charge to the jury, the court asked whether the jurors had any reason to believe they could not give full and complete attention to the deliberations. One juror replied, "The only thing I know of, my grandpa is real sick in Russellville and not expected to live. Very long, you know." Marchant neither requested the court replace the juror with an alternate, nor objected when the court discharged the alternate. On appeal, Marchant argues that the juror's knowledge of his grandfather's imminent death may have pressured him into reaching a hasty verdict, thus depriving Marchant of his rights to due process and an impartial jury.

Even assuming that Marchant properly preserved the issue on appeal, we do not believe that the district court abused its discretion. The court was invested with wide discretion in determining the competency of jurors. *United States v. Key*, 717 F.2d 1206 (8th Cir. 1983). Marchant has not produced any evidence showing that the juror's anxiety over his grandfather's health rendered him incompetent to understand the issues and to conduct deliberations. Marchant notes only that the juror began crying when polled as to his verdict and continued to cry until he left the courtroom with other jurors. The tears of a juror may reflect a sympathetic nature, but standing alone would not demonstrate incompetency. We reject Marchant's claim.

III. CONCLUSION

We have examined the other issues including evidentiary matters raised by Marchant. These claims lack merit.

The record reveals no prejudicial error in the trial of the case. Accordingly, we affirm.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS. EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

	)	Magistrate's Docket
	)	No. 84-00375-1
United States of America	)	Case No. LR-CR-84-
	)	
v.	)	COMPLAINT for
	)	VIOLATION of
Lowell B. Marchant	)	U.S.C. Title 26
	)	
	)	Section 7201
	)	
Before Henry L. Jones, Jr.	)	P.O. Box 3392
Name of Magistrate	)	Little Rock, Arkansas 72203
		Address of Magistrate

The undersigned complainant being duly sworn states:

That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of LOWELL B. MARCHANT for the calendar year 1977, by examining the said taxpayer's tax return for the year 1977 and other years; by examination and audit of the said taxpayer's business and financial books and records; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of the said taxpayer's financial condition.

That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 15th day of April, 1978, in the Eastern District of Arkansas, MARCHANT, who during the calendar year 1977 was

married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by said taxpayer and spouse to the United States of America for the calendar year 1977, by filing and causing to be filed with the Director of Internal Revenue at Little Rock, Arkansas, a false and fraudulent joint income tax return on behalf of said taxpayer and spouse, wherein it was stated that their taxable income for the said calendar year 1977 was $190,322.00, and that the amount of tax due and owing thereon was the sum of $88,308.00, when in fact their joint taxable income for the said calendar year was substantially in excess of the $190,322.00 reported, upon which there was owning to the United States of America an income tax substantially in excess of the $88,308.00 reported.

/s/ Robert W. Beardsley
Special Agent

Sworn to before me, and subscribed in my presence. April 13, 1984.

/s/ Henry L. Jones, Jr.
United States Magistrate

APPENDIX C

FILED
April 16, 1984
Carl R. Brents, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

United States of America	)	
	)	NO. LR-CR-84-41
vs.	)	
	)	26 U.S.C. §7201
Lowell B. Marchant	)	

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

That on or about the 15th day of April, 1978, in the Eastern District of Arkansas, LOWELL B. MARCHANT, a resident of Mountain Home, Arkansas, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1977 by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of Arkansas, a false and fraudulent income tax return on behalf of Lowell B. Marchant and his wife, which was filed with the Internal Revenue Service, wherein it was stated that his taxable income for said calendar year of 1977 was the sum of $190,322.00, and that the amount of tax due and owing thereon was the sum of $88,308.00, whereas as he then and there well knew, his joint taxable income for the said calendar year was substantially in excess of the $190,322.00 reported, upon which there was owing to the United States of America, an income tax

substantially in excess of the $88,308.00 reported as owed, all in violation of Section 7201, Internal Revenue Code; 26 U.S.C. Section 7201.

COUNT II

That on or about the 15th day of April, 1979, in the Eastern District of Arkansas, LOWELL B. MARCHANT, a resident of Mountain Home, Arkansas, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1978, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of Arkansas, a false and fraudulent income tax return on behalf of Lowell B. Marchant and his wife, which was filed with the Internal Revenue Service, wherein it was stated that his adjusted gross income for said calendar year was the sum of $76,124.00, and that the amount of tax due and owing thereon was the sum of $25,072.48, whereas, as he then and there well knew, joint taxable income for the said calendar year was substantially in excess of the $76,124.00 reported, upon which said taxable income there was owing to the United States of America, an income tax substantially in excess of the $25,072.48 reported as owed, all in violation of Section 7201, Internal Revenue Code; 26 U.S.C. Section 7201.

A TRUE BILL.

/s/ Cloie Morgan

GEORGE W. PROCTOR
United States Attorney

Sandra W. Cherry
Assistant United States Attorney
P.O. Box 1229
Little Rock, Arkansas 72203
501-378-5408
FTS 740-5408

APPENDIX D

DEFENDANT'S REQUESTED INSTRUCTION NO. 17

The evidence shows that the Defendant did not prepare the tax returns in question and that they were prepared for him by Mr. John Shock, a person who held himself out as one qualified to prepare federal income tax returns for others.

If the Defendant provided the aforesaid John Shock with full information with relation to his taxable income and expenses during the year, or he believed he had fully supplied such information, and that the Defendant then adopted, signed and filed the tax return on Form 1040 as prepared by John Shock without having reason to believe that it was not correct, then you will find the Defendant not guilty.

If, on the other hand you find beyond reasonable doubt that the Defendant did not provide full and complete information to John Shock, or that he knew that the return as prepared by John Shock was not correct and substantially understated the tax liability of Defendant (and his wife), then you are not required to find the Defendant not quilty simply because he did not prepare the return himself but rather had it prepared for him by another.

Given _____

Refused _____

2 Devitt & Blackmar, Fed. Jury Instr., 3rd Ed., §35.18

DISTRICT COURT'S RULING ON REQUESTED JURY INSTRUCTIONS

(TR. 891-892)*

THE COURT: The record will reflect that we, of course, are still out of the presence of the jury. And something over thirty minutes ago, the lawyers for the parties were given the instruction that the court intends to give.

They were given an opportunity to review those. I understand that they have now had an opportunity to do that and are prepared to make their record in relation to them.

I will first allow the government to make the record they wish to in relation to the instructions the court intends to give.

MS. CHERRY: Your Honor, they're fine with the government.

THE COURT: All right. I'll allow the defendant to make the record that the defendant wishes to make.

* * *

(TR. 894-895)

MR. SAYRE: Specifically, Your Honor, we request that the court reconsider the failure to give defendant's requested instruction number seventeen.

There was a similar instruction proposed by the government, which is – well, it is verbatim from Devitt and Blackmar's standard instruction thirty-five point eighteen, with regard to the preparation of a return by an accountant, and the reliance upon the accountant by the party.

And I believe that it would be -- well, the instructions needed would be reversible error if it is not included with regard to the preparation of the return by another, in this instance.

THE COURT: Well, I simply don't agree. I think nine and ten have correctly and very adequately set forth the elements that must be proved.

Let me merely comment that Devitt and Blackmar have a lot of instructions in there -- they needed them to fill up their book -- that are not necessary to every case.

MR. SAYRE: But, in this case, Your Honor --

THE COURT: I understand you believe they are in this case, and you've made your record.

MR. SAYRE: We would object, then, and note the exception of the failure to give defendant's requested instruction number seventeen.

* References "TR." are to the transcript prepared by the official court reporter and lodged in the Circuit Court as a part of the record on appeal.

APPENDIX E

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. *Constitutional Provisions.*

United States Constitution Article III, Section 2, Clause 3:

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

United States Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. *Federal Rules of Criminal Procedure:*

Rule 18. Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

3. *Statutes:*

Title 18 United States Code:

§ 3237. Offenses begun in one district and completed in another.

(a) Except as otherwise expressly provided by enactment of Congress, and offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district

other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

(Subsection (b) now reads, after amendment by the Tax Reform Act of 1984, Pub. Law 98-369, as follows with the changes italicized).

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, *or where venue for prosecution of an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law) is based solely on a mailing to the Internal Revenue Service*, and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

Title 26 United States Code:

§ 6351. Periods of Limitation on criminal prosecutions.

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years —

* * *

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

* * *

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. (The preceding sentence shall also be deemed an amendment to section 3748(a) of the Internal Revenue Code of 1939, and shall apply in lieu of the sentence in Section 3748(a) which relates to the time during which a person committing an offense is absent from the district wherein the same is committed, except that such amendment shall apply only if the period of limitations under section 3748 would, without the application of such amendment, expire more than 3 years after the date of enactment of this title, and except that such period shall not, with the application of this amendment, expire prior to the date which is 3 years after the date of enactment of this title.) Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States. For the purpose of determining the periods of limitation on criminal prosecutions the rules of Section 6513 shall be applicable.

§ 7201. Willful failure to collect or pay over tax.

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties

provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Supreme Court, U.S.
FILED
JAN 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-950

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOWELL B. MARCHANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges his conviction for attempted income tax evasion on grounds of improper venue, running of the statute of limitations, and erroneous failure to give a requested jury instruction.

1. On April 16, 1984, a grand jury in the Eastern District of Arkansas charged petitioner with willfully attempting to evade his income tax liabilities for the years 1977 (Count I) and 1978 (Count II) "by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of Arkansas, a false and fraudulent income tax return" in violation of 26 U.S.C. 7201 (Pet. App. C1-C2). During 1977 and 1978 petitioner and his wife resided in the Western District of Arkansas, but his tax returns were prepared by an accountant in the Eastern District of Arkansas (*id.* at A5). On petitioner's motion, the United States District Court for

the Eastern District of Arkansas transferred the case for trial to the Western District pursuant to 18 U.S.C. 3237(b), which allowed him to elect to be tried in the district in which he was residing (Pet. App. A3). Several pre-trial motions to dismiss for alleged venue and statute of limitations infirmities were preserved in the transfer and later denied by the district court for the Western District of Arkansas (*ibid.*; Pet. 6-7).

At trial, the government introduced evidence showing that petitioner, who held large interests in several businesses, had omitted substantial receipts of money from his 1977 and 1978 tax returns. The evidence showed that substantial amounts of loan interest, rent, and income from sales had not been reported. It also showed that purchases of wearing apparel, home furnishings, real estate, and an airplane had been negotiated with petitioner's corporate checks and entered on the corporate books as advertising, equipment repair, inventory purchases, or other business expenses; some purchases that were so recorded were made with corporate checks payable to fictitious companies, which petitioner or his wife then endorsed in the companies' names and used in purchasing cashier's checks. Pet. App. A2-A3; Tr. 191-192, 264-266, 279-286, 289-296, 614-619, 621-636, 647-651, 823-824.

Petitioner's accountant tax-return-preparer testified, as did petitioner, and, at the close of the five-day trial, petitioner requested an instruction to the jury that he should be found not guilty if he supplied complete information to his accountant, or believed that he had, and signed and filed the returns without having reason to believe they were not correct (Pet. App. D1). The district court ruled, however, that the elements of the offense of willful attempted evasion of taxes were adequately set out in the instructions the court intended to give and denied petitioner's requested instruction (*id.* at D2-D3).

The jury convicted petitioner. The district court sentenced him on January 23, 1985, to one year of imprisonment on Count I, and fined him $10,000 and imposed three years' probation on Count II (Pet. 8).

Petitioner appealed on the grounds, inter alia, that the indictment was infirm because of improper venue; that, with respect to Count I, the statute of limitations had run; and that, for both counts, the trial judge's failure to instruct the jury with respect to petitioner's reliance on his tax return preparer was reversible error (Pet. App. A2).[1] The court of appeals affirmed (*id.* at A1-A12). It held that venue was properly in the Eastern District of Arkansas, where petitioner had set into motion the preparation and attestation of false tax returns by his accountant (*id.* at A3-A5); that the indictment was timely because petitioner's absence from the country for 11 days prior to the return of the indictment tolled the statute of limitations for that period of time (*id.* at A5-A7); and that petitioner's proffered instructions either were "not supported by the facts" or were covered by the instructions given, which "adequately informed the jury of [petitioner's] theory of defense and enabled his counsel to make an adequate argument on the basis of that theory" (*id.* at A10).

2. The court of appeals correctly affirmed the district court's judgment and rulings. Its factbound decision upholding the district court's refusal to utilize petitioner's proposed charge concerning his reliance on his tax return

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[1]Petitioner also contended unsuccessfully on appeal that the district court erred in allowing admission of certain evidence, in failing to discharge an allegedly incompetent juror, and in failing to give other instructions he had requested (Pet. App. A2, A8-A9, A11; Appellant's C.A. Br. 33-39, 41-44). He does not press these issues in his petition.

preparer does not conflict with any decision of this Court or any other court of appeals.[2]

a. Because, as a general matter, the evidence must support a proffered instruction, petitioner here was entitled to his requested instruction only if there was evidence before the court of his good faith reliance on the accountant and full disclosure to him. See, *e.g.*, *United States* v. *White*, 671 F.2d 1126, 1131 (8th Cir. 1982); *United States* v. *Anderson*, 577 F.2d 258, 260-261 (5th Cir. 1978); *Bursten* v. *United*

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[2]Petitioner's other contentions—regarding allegedly improper venue and the statute of limitations bar—were fully considered and correctly rejected by the court of appeals (Pet. App. A3-A7). Its holding on these issues also does not conflict with any decision of this Court or any other court of appeals, and we rely upon the court's opinion here.

With regard to the venue issue, we add that, even if petitioner should have been indicted in the Western District, it is hard to imagine an error more harmless, since that was where—by his request—he was tried, and there is no reason to suppose that a grand jury there would not have indicted him when a petit jury there convicted him. See Pet. App. A5 n.5. The indictment was "sufficient." See *United States* v. *Bailey*, 444 U.S. 394, 414 (1980). Moreover, the constitutional and statutory right is to *trial* in the district in which the offense was committed; there is no provision of law requiring indictment in the district of the offense.

With regard to petitioner's statute of limitations contention, we add that Fed. R. Crim. P. 45(a) provides that, in computing any period of time, the "last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, * * * in which event the period runs until the end of the next day which is not one of the aforementioned days." Thus, should the last day of the six-year statute of limitations period be calculated here as falling on Sunday, April 15, 1984, the statute of limitations period expired at the end of the next day, Monday, April 16, 1984 — the date on which the indictment was returned. See U.S. C.A. Br. 17-20. But see *United States* v. *Guerro*, 694 F.2d 898, 901 n.5 (2d Cir. 1982), cert. denied, 459 U.S. 1222 (1983); *United States* v. *Coniam*, 581 F. Supp. 348 (D. Conn. 1984). (Note that Pet. App. A5 erroneously states that petitioner's 1977 tax return was filed in 1977 rather than 1978.) In addition, because April 15, 1978, was a Saturday, the tax return was not due until April 17, 1978 (see 26 U.S.C. 7503), and the United States had until six years from that date to file charges (see *id.* §§ 6513(a), 6531).

States, 395 F.2d 976, 981 (5th Cir. 1968).[3] The record in this case establishes that petitioner failed to disclose relevant information to the accountant who prepared his tax returns. The accountant used the running totals of general ledgers of petitioner's various corporations to prepare the tax returns of the corporations and petitioner. These summaries were posted monthly from cash receipts and cash disbursement journals, which the accountant did not consult (Tr. 165-166), and the evidence established unrecorded, systematic diversions of money to petitioner from sales not entered on the corporate books (Tr. 621-638). Further, as noted above (page 2, *supra*), personal purchases were negotiated with checks drawn on the corporations' accounts, sometimes payable to fictitious trucking companies and endorsed by petitioner or his wife in these companies' names; the checks were then recorded on the general ledgers as a series of business expenses.[4] Again, the accountant was not provided with these underlying checks (Tr. 58-59); all the information he used to prepare petitioner's tax returns was from other sources (Tr. 52-53, 165-166, 170). Because the record clearly established that petitioner had not disclosed all relevant information to his tax return preparer, the courts below were correct in holding that petitioner was

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[3]Petitioner contends (Pet. 14-16) that *Bursten* and *United States* v. *Mitchell*, 495 F.2d 285 (4th Cir. 1974), conflict with the court of appeals' decision here. Both *Bursten* (395 F.2d at 981) and *Mitchell* (495 F.2d at 287-288), however, recognized that a requested instruction must have some evidentiary foundation. They are, therefore, entirely consistent with the holding in this case.

[4]Indeed, defense counsel admitted in closing argument that there were sales not recorded on the corporate books and personal expenditures made with corporate checks, which were then recorded on the corporate books as legitimate business expenses (see, e.g., Tr. 941-942, 972, 977). Defense counsel blamed these discrepancies on the mistakes and errors of others (see, e.g., Tr. 927-928, 938, 942, 957-958, 972-973).

not entitled to the proffered jury instruction concerning his reliance upon his accountant to prepare his tax returns correctly.

b. In any event, the trial court instructed the jury that the government had to prove, inter alia, that the petitioner had knowledge that more tax was owed than he disclosed (Tr. 1002); that he "willfully attempted, in some manner, to evade or defeat such additional tax, with the specific intent to defraud the government of such additional tax" (*ibid.*); and that "he knew it was his duty under the law to state [the additional income] in his return" (Tr. 1003). The court further instructed that "[a]n act or a failure to act is 'willfully' done if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done[,] as distinguished for [*sic*] something accidental, inadvertent, or negligent" (*ibid.*); that "[m]ere mistake or negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law" (Tr. 1004); that "[t]he law makes a distinction between a purposeful tax violator and one who merely files an incorrect return" (*ibid.*); and that "[i]t is not the purpose of the law to penalize innocent mistakes" (*ibid.*). Under these instructions, the jury could not have convicted petitioner had it believed his repeated arguments (see, *e.g.*, Tr. 931, 947, 951-953) that he had reasonably relied upon his accountant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1986